

lorry resembling the one which was involved, or in fact that the 1st respondent owned any lorry at all.

On the question of time, none of the 2nd respondent's evidence as to time was corroborated. The attendant was not called. Witnesses are frequently extremely vague as to what time of day it is at any particular time, and in fact the appellant himself had said in his Report that the accident occurred somewhere about 5.45 p.m. Although there is no doubt that the accident did take place at about 7 p.m., it may well be that the time given by the 2nd respondent is no more accurate than that given by the appellant. If the 2nd respondent's story as to his movements that day was accurate there would have been abundant evidence available to substantiate his story but none was forthcoming.

Bearing in mind the principles enunciated in the cases to which I have referred, and the fact that the learned trial Judge did not have the advantage of seeing and hearing the two soldiers in the witness box, and the unsatisfactory aspects of the recording of the soldiers' statements to the police, and the fact that the evidence before the Assistant Registrar was taken 10 months after the event, and the nature of the discrepancies, I am of the opinion that the discrepancies in the evidence of these two soldiers were not sufficient to justify wholly rejecting their evidence.

The learned trial Judge came to the conclusion that the appellant gave the number of the lorry to Sergeant Suleiman on the 7th February in an attempt to fasten the responsibility for the accident on an ascertainable individual as an inference from his findings of fact that the appellant knew that the 1st respondent owned a lorry resembling the one which caused the damage, of which there was no evidence whatever, and that Sergeant Suleiman was a competent and reliable police officer, an assessment which was not borne out by the facts, and from the inference which necessarily followed from such findings that the appellant must have obtained the number of the lorry from somebody else while he was in hospital, which was unsupported by any factual evidence. As a result of reaching this conclusion from these inferences the learned trial Judge took the view that it was the appellant who gave the soldiers the number of the lorry which they in turn passed on to the police, when it was by no means clear whether or not the soldiers visited the appellant in hospital before they made their statements. As I have already said I do not think that the evidence disclosed that Sergeant Suleiman was a witness upon whom any great reliance could safely be put, and in all the circumstances of the case, and in particular the fact that the Traffic Branch Inspector was himself a Sikh, it may well be that the information as to the number of the lorry came to Sergeant Suleiman from a source other than the appellant.

A The inferences that the appellant thought it would be more advantageous to leave the positive identification of the lorry to two ostensibly independent witnesses and that it was *per se* improbable that if the appellant had obtained the number of the lorry from somebody else while in hospital he would have testified that he saw the number of the lorry at the time of the accident, were essential explanations if the learned trial Judge's conclusions were to be accepted. But in any event such inferences seem to me to overlook the risk involved in relying on the evidence of two witnesses who the appellant might have been unable to find again, the fact that the appellant's case would have been in no way weakened by his identifying the vehicle, and the fact that the pain the appellant was suffering for some days after the accident not only rendered him unfit to make a statement but also probably precluded him from thinking out such a plot.

B In my opinion therefore the inferences which the learned trial Judge drew from the evidence of the two soldiers cannot be supported. I am also of the opinion that it unmistakably appears from the evidence that the reasons given by the learned trial Judge for accepting the evidence of Sergeant Suleiman are not satisfactory.

C Since writing this judgment I have had the advantage of reading the judgment of the President of the Court and I am in full agreement with him as to the course that this Court should follow in the circumstances. The issue of identification having been decided in favour of the appellant I would order that this Court should itself hear further argument on the remaining issue of negligence and give judgment thereon, the question of costs to stand over until the resumed hearing.

Order accordingly.

Solicitors: Lovelace & Hastings; Cheang Lee & Ong.

## LEOW WEI PIN v. MEYAPPA CHETTIAR

[A.C.J. (Rigby J.) February 2, 1959]

[Penang — Civil Appeal No. 15 of 1958]

H *Practice and Procedure — Judgment debtor — Consent judgment — Failure to comply with Court order to pay debt by instalment — Instalment more than one month in arrears — Remedy — Subordinate Court Rules, 1950, O.20 r.5(1), O.21 r.27(2) and O.22.*

I In this case the appellant was sued by the respondent for money lent. He consented to judgment and offered to pay the judgment debt by monthly instalments of \$50 each. The learned President gave judgment accordingly and embodied in his order a direction in terms offered by the appellant; but the appellant failed to comply with that order. The respondent subsequently caused a judgment notice in Form 23 of the Subordinate Court Rules to be issued calling upon the appellant to show cause why he should not be committed to prison for wilfully neglecting to comply with the terms of the

consent judgment. On the return day it was submitted by the appellant that the order under the judgment was not enforceable. He relied on O.20 r.5(2). The respondent contended that O.21 r.27(2) was ancillary to O.20 r.5(2). The learned President accepted respondent's contention, and without further hearing any evidence as to the means of the debtor and his ability or otherwise to satisfy the order to pay by instalments, he accordingly made the committal order which forms the subject matter of this appeal.

Held: (1) before a Court could make an order under O.21 r.27(2) it should have had some evidence before it that since the making of the original order to pay by instalments the appellant had had the means to pay and had wilfully refused or neglected to comply with the terms of the order;

(2) under O.20 r.5(2) if any instalment is more than one month in arrears the order "shall be deemed to be vacated." Since the instalments in this case were more than one month in arrears the original order made by the President had been vacated by the natural process of effluxion of time and was, therefore, no longer in force, and therefore there was no valid and substantial order which could form the basis of an application under O.21 r.27(2) for commitment proceedings against the debtor, since there was no order in existence with which he was failing to comply;

(3) for an action to be taken under O.21 r.27(2) the order which it was alleged that the debtor was wilfully refusing or neglecting to comply with required to be an order in existence at the time of such refusal or neglect. Therefore the judgment notice taken out by the judgment creditor under O.21 r.27(2) was irregular and the order made by the President thereon was bad;

(4) even where a judgment notice was issued for wilfully failing or neglecting to comply with the provisions of section 4(9) of the Debtors Ordinance, 1957, before the debtor can be committed to prison "it must appear that, since the date of the Order directing payment . . ." he had had sufficient means to comply with the order: that means that evidence of a reasonably direct character is required before this punishment for non-payment of debt can be imposed;

(5) therefore the appeal ought to be allowed and the order made by the President set aside on the ground that the wrong procedure had been followed by the judgment creditor in that the issue of the judgment notice on which the committal order was founded was irregular;

(6) the remedy open to the judgment creditor on failure of the debtor to comply with the instalment order under O.20 r.5(1) was to have applied for a judgment summons under O.22 r.2.

#### Cases referred to:—

- (1) *Barefoot v. Clark* [1949] 2 K.B. 97.
- (2) *Reg. v. Judge of Brompton County Court* (1886) 18 Q.B.D. 213.
- (3) *Stonor v. James Fowle* (1888) 13 App. Cas. 20.
- (4) *Neson v. Metcalfe* [1921] 1 K.B. 400.

#### CIVIL APPEAL.

*M. Knorpel* for the appellant.

*Chew Choon Poon* for the respondent.

**Rigby J.:** This was an appeal from the decision of Mr. Au Ah Wah, President of the Sessions Court, in respect of an Order made by him, acting under Order XXI, Rule 27(2), of the Subordinate Courts Rules, 1950, committing the appellant, a judgment debtor, to prison for 21 days for wilfully neglecting to comply with an earlier Order of the Court ordering him to pay a judgment debt and costs by monthly instalments of \$50 each. The learned President,

at the time of making the committal order, directed that its execution be suspended if the amount ordered to be paid was paid within one month from the date of the making of the Order.

I allowed the appeal but since it involved issues of some practical interest and importance I stated that I would give my reasons in writing.

I now do so.

The brief facts of the case were that the appellant was sued by the respondent, a licensed moneylender, for money lent. To that claim he entered a written Defence. Prior to the hearing of the action, by a letter in writing addressed to the Court and dated the 14th August, 1957, he withdrew his defence and consented to judgment being entered against him for the amount of the claim and costs. He concluded that letter with the paragraph:—

"I offer to pay the plaintiff the judgment debt by monthly instalments of \$50 each with effect from 1.9.57 and consent to an order being made against me in terms of this offer."

On the 20th August, 1957, 6 days later, the learned President gave judgment by consent for the amount claimed and costs. In pursuance of the written offer made by the appellant, and in accordance with Order XX, Rule 5(1), the President embodied in that Order a direction that the debt be paid by instalments of \$50 per month commencing on the 1st September, 1957, and thereafter on the first day of each succeeding month. The appellant failed to comply with that Order. Indeed, it is admitted that he has only paid \$20 towards the satisfaction of this debt.

On the 4th December, 1957, the respondent sought to execute the judgment by obtaining an Order for seizure and sale of the appellant's property. Unfortunately, those proceedings proved abortive since the goods seized were in fact the property of the partnership in which the appellant was concerned whereas the debt incurred was one by the appellant in his personal capacity. The property accordingly had to be released.

On the 5th March, 1958, the respondent caused a judgment notice, in Form 23 of the Rules, returnable on the 2nd April, to be issued calling upon the debtor to show cause why he should not be committed to prison for wilfully neglecting to comply with the terms of the judgment debt by instalments of \$50 a month.

On the return day it was submitted on behalf of the appellant, the judgment debtor, that the Order made on the 20th August was not enforceable. In support of that contention reference was made to Order XX Rule 5(2). It is, I think, convenient to set out the whole of Order XX Rule 5. It provides:—

"Order for instalments. 5.(1) Any debtor against whom judgment has been, or is about to be, given may apply to the Court for leave to pay the judgment debt by instalments, or, if an order for payment by instalments has been made, for leave to pay by reduced instalments, and the Court, after hearing the parties, may make such order as is just.

(2) If any such instalment is more than one calendar month in arrears, the said order shall be deemed to be vacated and the judgment creditor may execute for the whole amount then due on the judgment, but the judgment debtor may apply for another order.

(3) Any judgment creditor may, if an order for payment by instalments has been made, apply that it be vacated, or that the instalments be increased, and the Court, after hearing the parties, may make such order as is just."

It was argued on behalf of the judgment creditor that Order XXI Rule 27 applied and that as the judgment debtor had been guilty of a contempt of Court the Court could make an order for committal unless the judgment debtor showed cause. It was further contended that Order XX Rule 5(2) did not preclude the judgment debtor from proceeding under Order XXI Rule 27(2). The relevant part of Order XXI Rule 27(2) provides that "If a judgment debtor is guilty of a contempt of Court under the provisions of this Order"—and I emphasise those words "under the provisions of this Order"—"or wilfully refuses or neglects to comply with the provisions of any order of Court directing him to do or refrain from any act.....", then a judgment notice may be addressed to him in the appropriate form (Form 23) to show cause why he should not be committed to prison.

Order XXI Rule 27(3) provides that:—

"The Court at the hearing of the summons may hear such evidence as it thinks fit and may commit the judgment debtor to the civil prison, or may put him on such terms or accept such undertaking as it may think fit."

The learned President accepted the argument that Order XXI Rule 27(2) was ancillary to Order XX Rule 5(2) and that the matter was properly brought before him under Order XXI Rule 27(2). Thereupon, without further ado and without hearing any evidence as to the means of the debtor and his ability or otherwise to satisfy the Order to pay by instalments, he accordingly made the committal Order which forms the subject matter of this appeal.

The first point taken by Mr. Knorpel, for the appellant, and, indeed, conceded by Mr. Chew Choon Poon, for the respondent, was that before the learned President could make the committal order he did make he should have had some positive evidence before him that since the date of the judgment the debtor had, or had had, the means to pay the instalments in respect of which he had made default and that he had wilfully refused or neglected to pay the same. In support of that contention I was referred by Mr. Knorpel to the cases of: *Barefoot v. Clark* (1); *Reg. v. Judge of Brompton County Court* (2); *Stonor v. James Fowle* (3); and *Neson v. Metcalfe* (4). Whilst it is true that those cases are primarily concerned with the proper interpretation of section 5 of the Debtors Act, 1869, I am of the opinion that the principle arising out of those cases is the same. In my view, Mr. Knorpel's contention is well-founded. Even assuming for a moment that these proceedings were properly brought in the form of a judg-

ment notice under Order XXI Rule 27(2) of the Subordinate Courts Rules, 1950, I am of the opinion that before the Court could make the Order it did make it should have had some evidence before it that since the making of the original Order to pay by instalments the appellant had had the means to pay and had wilfully refused or neglected to comply with the terms of the Order. In arriving at that conclusion I am conscious of the fact that the judgment notice was an order directed to the appellant to show cause why he should not be committed to prison for wilfully refusing or neglecting to comply with the provisions of the Court Order and, therefore, on the face of that Order, the onus was upon him to show that he had not wilfully refused or neglected to comply with the Order. It is clear, however, that no evidence at all was adduced before the President and there is nothing upon the extremely brief record of the learned President to indicate that the debtor was even called upon to show cause or given an opportunity to show cause. I was, therefore, satisfied that on this ground alone the appeal ought to be allowed and the Order made by the learned President set aside.

Mr. Knorpel's next point was that in any event the issue of the judgment notice dated the 5th March, 1958, to the judgment debtor, under Order XXI Rule 27(2) was bad and the Order made thereon by the learned President on the return day was irregular. He based this submission on two grounds.

It is manifest that the judgment notice issued to the debtor under Order XXI Rule 27(2) was by reason of the failure of the debtor to comply with the Order made by the President under Order XX Rule 5(1) in accordance with the debtor's own offer to pay the debt by monthly instalments of \$50. The debtor clearly failed to comply with that Order. But Mr. Knorpel submitted that having regard to the express words of Order XX Rule 5(2) the only effect of the debtor failing to comply with the Order would be that if any one instalment was more than one calendar month in arrears then the Order "shall be deemed to be vacated." The judgment creditor would then be entitled to take such action as he thought fit to secure immediate payment of the whole debt. In this case the judgment creditor did take such action because he proceeded to levy execution, albeit abortively, on the debtor's goods and chattels. Clearly he could not have done this if the instalment order was still in force, so that by that very fact he acknowledged that the instalment order was no longer in force or, to use the word of the section itself, had been "vacated." It is to be observed that under Order XX if any instalment is more than one month in arrears the Order "shall be deemed to be vacated." It followed, therefore, that since the instalments in this instance were more than one month in arrears the Order made by the President had been vacated by the natural process of effluxion of time and was, therefore, no longer in force. If it was no longer in force,

then there was no valid and subsisting Order which could form the basis of an application under Order XXI Rule 27(2) for commitment proceedings against the debtor, since there was no Order in existence with which he was failing to comply. Order XXI Rule 27(2) provides for two things, namely:—

(1) if a judgment debtor is guilty of a contempt of Court under this Order; or

(2) if he wilfully refuses or neglects to comply with the provisions of any Order of Court directing him to do or refrain from any act,

then he can be called upon to show cause why he should not be committed to prison. There could be no question of the debtor being guilty of a contempt of Court under "this Order," since Order XXI deals only with execution proceedings and matters relating thereto. If, therefore, the debtor was guilty of anything he would only be guilty under the latter part of the Rule, which deals with wilfully refusing or neglecting to comply with the provisions of a Court Order. But it is to be observed that the words used in the Rule are in the present and not in the past tense, namely, that the judgment debtor "wilfully refuses or neglects to comply" etc., etc. The words, to my mind, necessarily imply that there is a valid Order in existence with which the debtor is refusing or neglecting to comply. But the Order made by the President in this instance was no longer in existence, since it was deemed to have been vacated by effluxion of time. At worst, therefore, the debtor had failed to comply with an Order which was no longer in existence. In my view, for action to be taken under Order XXI Rule 27(2) the Order which it was alleged the debtor was wilfully refusing or neglecting to comply with required to be an Order in existence at the time of such refusal or neglect. I am, therefore, in agreement with the argument of Mr. Knorpel that the judgment notice taken out by the judgment creditor under Order XXI Rule 27(2) was irregular and the Order made by the President thereon was bad.

Secondly, Mr. Knorpel contended that the proceedings under Order XXI Rule 27(2) by way of a judgment notice were irregular and bad and that the appellant should have proceeded, if at all, under Order XXII Rules 2(1) and 2(5). He contended that the words "any Order of Court directing him to do or refrain from any act" appearing in Order XXI Rule 27(2) do not include Orders by the Court in relation to the payment of money by judgment debtors. In other words, that the Order of the Court therein contemplated means, and only means, an Order of the Court to do some act other than the payment of money. Mr. Knorpel contended that the position of judgment debtors with regard to Orders against them in relation to the payment of money was fully and exclusively covered by Order XXII and, of course, also by the Debtors Ordinance, 1957. Again, I am of the opinion that that contention is well-founded. It is to be observed that Order XXI is

A expressly entitled "Execution." Order XXII is entitled "Judgment Debtors."

Order XXII Rule 2(1) provides that a judgment creditor may, whether execution has issued or not, summon any judgment debtor for an examination as to his means to pay the judgment debt.

B Order XXII Rule 2(4) provides that on the hearing of such a summons either party may adduce any evidence and the Court may make such order for payment, whether by instalments or in one lump sum, as may be just, or may make no order.

C Order XXII Rule 2(5) provides that if the judgment debtor, after being summoned for examination as to his means, does not appear, he may be arrested and brought up for such examination—and additionally dealt with for contempt of Court for not appearing in answer to the summons—or, alternatively, the Court, in his absence, *ex parte* on the application of the judgment creditor, may make such order for payment of the debt by him as it thinks fit.

D Order XXII Rule 6 provides that if a judgment debtor wilfully fails or neglects to comply with the provisions of any Order made under sub-Rule (4) or (5) of this Rule—and I emphasise the words "made under sub-Rule (4) or (5) of this Rule—then he may, after due notice giving him an opportunity to show cause why he should not be committed to prison for such wilful failure or neglect, be so committed to a civil prison. It is pertinent to observe here that the form to be served upon him under this sub-Rule is Form 23, the same form as that to be followed prior to commitment under Order XXI Rule 27(2).

F It seems to me, therefore, clear from the provisions of this Order—Order XXII—that a judgment debtor summons must first have been issued to the debtor and an Order for payment of the debt, whether by instalments or in one lump sum, made by the Court consequent upon the issue of that judgment debtor summons, before a judgment notice can issue for wilful failure or neglect to comply with the provisions of that Order.

H I It might be said that the best evidence as to a debtor's ability to pay is his own offer to pay. If, therefore, at the time judgment is given against him, whether by consent or otherwise, he makes an offer to pay the debt by instalments, and that offer is accepted by the creditor and by the Court, and an Order made thereon under Order XX Rule 5, then there can be no necessity for the issue of a judgment debtor summons for examination as to means and if, thereafter, the debtor fails to comply with his own undertaking as to payment, the judgment creditor can proceed forthwith by way of the issue of a judgment notice. I do not think, however, that that argument can be sustained, and I agree with Mr. Knorpel that, in effect, Order XX Rule 5 amounts to more than an indulgence granted to the debtor in that as long

as he complies with his undertaking — and the Order made thereon to pay the judgment debt by instalments — then the judgment creditor can take no action and cannot, of course, execute for the full amount of the debt. As long as that instalment order made under Order XX Rule 5 remains in force execution cannot be issued on the original judgment, because the effect of the instalment order is that there is no longer a present debt for the full amount of the claim but merely a debt accruing and due by so much a month. If, however, any one instalment is more than one month in arrears then the Order — and the obvious advantage accruing to the debtor thereunder — must be deemed to be vacated and the judgment creditor may levy execution for the full amount of the debt. In addition to levying execution he can issue a judgment debtor summons under Order XXII Rule 2. But what, in my judgment, he cannot do is to proceed forthwith and issue a judgment notice under Order XXI Rule 27(2). In my view Order XXI Rule 27(2) does not apply to proceedings against a judgment debtor for wilfully refusing or neglecting to comply with the provisions of any Order of Court where that Order relates to the payment of a sum of money because such proceedings are expressly governed by the provisions of Order XXII. As I have said, in my view a necessary prerequisite to the issue of a judgment notice under that Order is the issue of a judgment debtor summons and an Order made on that summons. It is the wilful disobedience to the compliance of the Order made on the judgment debtor summons which justifies the issue of the judgment notice.

Lastly, I would only add that even where a judgment notice is issued for wilfully failing or neglecting to comply with the provisions of the Order made on the judgment summons, having regard to the provisions of section 4(9) of the Debtors Ordinance, 1957, (which came into operation on the 1st April, 1958, by virtue of Legal Notification No. 72 of 1958) before the debtor can be committed to prison "it must appear that, since the date of the Order directing payment....." he has had sufficient means to comply with the Order. In the words of McCardie J. in *Neson v. Metcalfe* (4) at page 408):—

"That means that evidence of a reasonably direct character is required before this punishment for non-payment of debt can be imposed."

For these reasons I was of the opinion that this appeal ought to be allowed and the Order made by the learned President set aside on the further ground that the wrong procedure had been followed by the judgment creditor in that the issue of the judgment notice on which the committal order was founded was irregular.

I should add here that since the drafting of these grounds of decision Order XXII of the Subordinate Courts Rules, 1950, as it then stood, has been revoked and a new Order XXII headed "Rules Under The Debtors Ordinance, 1957" substituted therefor (see Legal Notification No.

316 of 1958). Such action confirms the view I have already expressed herein that the action taken by the judgment creditor under Order XXI Rule 27(2) was irregular and that the remedy open to him on failure of the debtor to comply with the instalment order made under Order XX Rule 5(1) — since execution proceedings were insufficient to satisfy the debt — was to have applied for a judgment summons under Order XXII Rule 2.

I may say that in arriving at this conclusion I can find no sympathy whatsoever for the appellant. It is apparent that the judgment of the 20th August, 1957, directing payment of \$1,635 by instalments of \$50 per month was made on the appellant's own undertaking. Since the date of that judgment he has paid the paltry sum of \$20. I venture to express the hope that the respondent will be more successful in the future in executing to the full his judgment against the appellant and compelling him to comply with the elementary obligations of honest conduct.

Solicitors: H. E. P. Powell & Co.; Cheer Choon Poon, Esq.

#### ISMAIL BIN ABDULLAH v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ. A.)  
September 2, 1959]

[K. L. — F.M. Criminal Appeal No. 22 of 1959]

*Criminal Law and Procedure — Jury trial — Summing up — Practice of quoting actual words of Evidence Ordinance — No assistance to jury — Seriousness of offence in evaluating and weighing evidence.*

In this case the Court's attention had been invited to one or two passages in the trial Judge's summing-up which considered in isolation could not be approved.

**Per curiam:** "We very much doubt the wisdom of the practice which seems to be on the increase nowadays of quoting the actual words of the Evidence Ordinance to juries. It has been said both in India and here that it is very much to be doubted whether quoting the actual words of the Evidence Ordinance as they stand can be of any great assistance to a jury. Again there was one passage which considered strictly in isolation suggested that the jury might be justified, if it was so disposed, in disregarding the seriousness of the offence of murder as a capital offence in evaluating and weighing the evidence before them."

#### COURT OF APPEAL.

H. L. Wrigglesworth for the appellant.

Mohd. Salleh bin Abas (Federal Counsel) for the respondent.

The judgment of the Court of Appeal was delivered orally by,

Thomson C.J.: We have considered this appeal and have most anxiously considered the grounds of appeal which have been very persuasively urged upon us by counsel for the appellant in an address which, if I may say so, acquired